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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 94-150
Regulations Governing Attribution	)	
of Broadcast and Cable/MDS Interests	)	
	)	
Review of the Commission's	)	MM Docket No. 92-51
Regulations and Policies Affecting	)	
Investment in the Broadcast Industry	)	
	)	
Reexamination of the Commission's	)	MM Docket No. 87-154
Cross-Interest Policy	)	

COMMENTS OF ABC, INC.

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February 7, 1997

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In the Matter of	)	
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Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests	)	MM Docket No. 94-150
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Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
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Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154

To: The Commission

COMMENTS OF ABC, INC.

ABC, Inc. ("ABC"), a wholly-owned subsidiary of The Walt Disney Company, submits herewith its Comments in response to the Further Notice of Proposed Rule Making ("Notice") in the above-entitled proceeding.[1] ABC owns and operates the ABC Television Network and ten television broadcast stations.

[1] MM Docket No. 94-150, MM Docket No. 92-51 and MM Docket No. 87-154, Further Notice of Proposed Rule Making, FCC 96-436 (released November 7, 1996).

Introduction

In ABC's 1995 comments in this proceeding, we urged that any new attribution rules must be narrowly tailored to reach only those interest that truly impart, in the substantial majority of cases, control over a licensee's core decision making. Overly broad attribution rules would artificially interfere with competition and limit the availability of capital to broadcasters at a time when they face requirements for substantial investment in new technology.

As set forth below, we believe that the Commission's proposal for a new "equity or debt plus" attribution rule would sweep too broadly, rendering attributable interests that do not create a likelihood of control over core station operations. We responded to the Commission's concern in 1995 that some conglomerations or concentrations of interests that are non-attributable under the current rules could allow sufficient control to make attribution appropriate by proposing a 50% capitalization or equity test to deal with such interests. We believe that it is a more properly tailored approach than the Commission's "debt or equity plus" proposal.

With respect to the attribution of television LMAs, we agree that they should be made attributable in the same fashion as are radio LMAs.

I. "Equity or Debt Plus" Attribution

In 1995 the Commission sought comment, as part of a general review of its attribution rules, "regarding the possibility that our ownership and attribution rules may be underinclusive in certain cases, failing to capture particular concentrations or conglomerations of ownership or influence that undermine diversity and competition."[2] In response, ABC agreed that individual attribution benchmarks -- such as voting-stock ownership and partnership interests -- could be subject to abuse by parties who structure their transactions to avoid attribution while retaining the kind of control over core licensee decision-making that the attribution benchmarks were designed to capture.

We accordingly proposed a second level of attribution review applicable where a party holds more than a 50% stake in the capitalization or equity of the licensee entity (be it corporation, partnership or limited-liability corporation). Our proposal was based on our belief that focusing on substantial investment interests -- rather than on general types of contractual relations whose terms and the consequent degree of potential control vary in individual cases -- is the best way to catch otherwise non-attributable arrangements that likely give control over a station.[3]

Under our proposal, the Commission would apply a presumption

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[2] Notice of Proposed Rulemaking, MM Docket Nos. 94-150, 92-51 and 87-154 (released January 12, 1995) ("Attribution Notice"), par. 99.

[3] Comments of Capital Cities/ABC, Inc. in MM Docket Nos. 94-150, 92-51 and 87-154 (filed May 16, 1995) ("ABC Attribution Comments") at 15-16.

of attribution to such a holder, rebuttable by a case-by-case, fact-based showing that the 50%-plus stakeholder does not have the right to exercise, and has not exercised, control over the licensee's core areas of programming, personnel or competitive practices. We stressed that in such a case-by-case review, the issue would be actual control, rather than potential control or "material influence."

In the current Notice, the Commission again addresses whether certain otherwise non-attributable interests should be made attributable and what factors should be used to do so. The Commission proposes an "equity or debt plus" attribution test that would look to financial interest, but would apply to only two specified classes of investors. The new rule would attribute ownership to party who (a) holds more than 33% of the debt or equity of a licensee, and (b) is either (i) a program supplier to the licensee or (ii) a same-market broadcaster or other media outlet subject to the broadcast cross-ownership rules.[4] The Commission suggests that the "program supplier" category could include program producers, syndicators and networks.[5]

We disagree with the "equity or debt plus" proposal because we think it would impute attribution to parties on the basis of relationships with licensees that are not relevant to control. Traditionally the Commission's "judgment as to what level of `influence' should be subject to restriction by the multiple

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[4] Notice, par. 12.

[5] Id., par. 19.

ownership rules has ... been based on [its] judgment regarding what interests in a licensee convey a realistic potential to affect its programming and other core operational decisions."[6] In our view, neither of the proposed "trigger" relationships convey such a "realistic potential."

The Commission's premise is that the potential for control over a licensee's core functions where a party holds a 33% ownership stake is somehow increased by the party's status as program supplier or same-market media owner. Thus, the Commission suggests with respect to program suppliers that "it has appeared that nonattributable investors can be granted rights over licensee decisions that might afford them significant influence over the licensee," and that parties "with existing local media interests could use financing or contractual arrangements, such as LMAs, to obtain a degree of horizontal integration within a particular local market that should be subject to local multiple ownership limitations."[7]

We disagree. A party's status as a station's program supplier pursuant to an arm's length contractual arrangement does not give the party control over the station's core operations. No one would dispute that it is necessary and proper for television licenses to

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[6] Attribution Notice, par. 4.

[7] Notice, pars. 16-17. Notably, as to both types of "trigger" status, the Commission cites LMAs as a possible mechanism by which control might be exercised. But the Commission has already recognized that an LMA is far more than just a program supply arrangement and has proposed in this proceeding a per se rule of attribution for LMAs. See Notice, page. 27.

acquire programming from outside suppliers. When a station freely chooses to obtain programming from outside sources, it is not abdicating control over programming, it is exercising it.

With respect particularly to network program suppliers, a station's decision to affiliate with a network is freely made. There is no basis for finding that a network affiliation agreement, or any program supply agreement, affords the network or supplier any "control" of the kind that justifies attribution. "Control" in that sense would imply the network or program supplier dominates a station's program choices against the wishes of the licensee. Such domination does not obtain in program supply arrangements voluntarily entered into by both parties. Moreover, any supposed "control" that might, to some observers, appear to flow to a network program supplier is tempered by the Commission's "right-to-reject" and network representation rules.[8]

Similarly, mere status as a same-market media owner does not provide any realistic potential to affect another station's core operations in the same market. The Commission suggests that a party with media interests in a market "could use financing or contractual arrangements" to exercise control over a broadcast station in the same market[9]. But that opportunity for control

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[8] 47 C.F.R. §§73.658(e) and (h). Just as the Commission noted with respect to the prime time access rule, the attribution rules would be an "imprecise, indiscriminate" means to regulate the network-affiliate relationship. The Commission's rules directly addressing that relationship are better suited to the task than a new attribution rule. See Report and Order, FCC 95-314 (released

would arise exclusively in the terms of the financing or contractual arrangement. The only specific example of such arrangements cited by the Commission are LMAs, which by their very nature involve a unique degree of control over both a station's programming and advertising inventory (a fact the Commission recognizes by proposing making LMAs attributable in the attribution proceeding). In any event, the likelihood of control that might be exercised by a same-market media owner would flow from his debt or equity interest, not from the fact that he owns another media interest in the market.

As the Commission notes, the new attribution proposal dealing with same-market owners reflects the same concerns as those addressed by the cross-interest policy.[10] ABC urged the Commission in 1995 to eliminate the policy because such concerns about the blunting of competitive incentives which are the historical underpinning of the cross-interest policy can be safeguarded by antitrust enforcement.[11] In any event, the Commission has never gone beyond the cross-interest policy to base a per se attribution rule on the presumption of anticompetitive conduct by a party whose interests might -- but by no means must -- give the opportunity for such conduct, and it should not enact such a rule now.

Thus, in our view, the Commission's proposal boils down to attributing ownership based on a 33% debt or equity stake, but applying that rule only to a party whose status as a program

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[10] Id.

[11] ABC Attribution Comments at 18-19.

supplier or same-market owner adds nothing to the likelihood that the party can exercise control over the station in which it holds an interest. There is no sound basis for directing a new attribution rule to those parties.

We ask that the Commission to give fresh consideration to our original proposal: a presumption of attribution for an investment or equity stake over 50%. We believe that concentrating on a party's financial stake in a licensee is the soundest basis for identifying likelihood of control, and that a 50% threshold, rather than 33%, more realistically identifies the type and level of interest that conveys a realistic potential to control the core operations of a licensee. At that 50% level there is a far greater likelihood that both the stakeholder (to protect his substantial investment) and the party having nominal control of the licensee (in recognition of the size of the stakeholder's investment) have a motive to act in accord with the stakeholder's wishes. Were a 50%-plus interest to carry actual proportional voting power, it would be a controlling interest. In the absence of any such voting or structural control, we think that only at the 50% level is it sensible and fair to establish a presumption that the holder of such a financial stake can "control" an entity against the wishes of those holding voting power.

For non-attributable interests short of a 50%-plus stake, we believe that the need for predictability outweighs the benefits of

case-by-case review of actual control.[12] As to parties that might seek to evade the Commission's multiple ownership rules by structuring transactions to avoid attribution, the Commission will continue to have the power and the responsibility under its existing standards of real-party-in-interest and de facto transfer of control to undertake case-by-case review of ownership in reviewing applications for new stations or transfer or assignments of existing stations. Under those standards, the Commission makes a review of the actual operation of a licensee to determine whether non-attributable interests nevertheless carry control of the station.[13]

II. Attribution of Local Marketing Agreements

ABC supported the Commission's proposal in the 1995 television ownership proceeding that local marketing agreements ("LMA") be made attributable for television as they are for radio.[14] The Commission

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[12] See Attribution Notice, pars. 5, 16, 46 (stressing the need for predictability and certainty in attribution rules).

[13] See Southwest Texas Public Broadcasting Council, 85 FCC 2d 713, 49 RR 2d 156, 158 (1981) ("the principal indicia of control examined to determine whether an unauthorized transfer of control has occurred are control of policies regarding (a) the finances of the station, (b) personnel matters and (c) programming"); accord Fresno PM Limited Partnership, 68 RR 2d 1645, 1648 (Rev. Bd. 1991); Rayne Broadcasting Co., Inc., 5 FCC Rcd. 3350, 67 RR 2d 1501, 1503 (Rev. Bd. 1990) ("test for determining whether a third party is a real-party-in-interest is whether that person [or persons] has an ownership interest, or will be in a position to control, actually or potentially, the operation of the station").

[14] Further Notice of Proposed Rulemaking, MM Docket Nos. 91-221 and 87-8 (released January 17, 1995), par. 138; Comments of Capital Cities/ABC, Inc. in MM Docket Nos. 91-221 and 87-8 (filed May 16, 1995) at 26-27.

explained in its order adopting the radio LMA rule that attribution of radio LMAs is necessary to prevent the use of time brokerage to circumvent the local ownership rules.[15] We believe the same justification supports adoption of a parallel attribution rule for television LMAs.

III. Transition Issues

The Commission proposes that interests that are rendered attributable by new rules be grandfathered to the extent that they were acquired prior to December 15, 1994, and only so long as the interests are not assigned or transferred. Thus the original interest holder could retain station holdings that resulted in violation of the Commission's multiple ownership rules as a result of new attribution rules, but the ownership grandfathering would not apply to an assignee or transferee.[16]

We concur with the Commission's attribution grandfathering proposal. Acquisitions made before the date when parties were put on notice that new attribution rules were contemplated should not be made attributable retroactively. We believe that the appropriate grandfathering date for most interests is the December 15, 1994 date chosen by the Commission, the adoption date of the first notice in this proceeding. Thereafter, parties acquiring interests subject to new attribution rules were on notice that the

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[15] Report and Order, MM Docket No. 91-140 (released April 10, 1992), par. 65.

[16] Notice, pars. 41-42.

Commission had such new rules in contemplation. It is, therefore, not unfair to apply new attribution rules to those interests and, if multiple ownership violations result, require prompt divestiture (allowing no more than six months).[17]

Conclusion

We agree with the Commission that a new attribution rule, designed to catch non-attributable interests that create a likelihood of control, is warranted. We believe our 50% equity or capitalization rule is more properly tailored to catch only the relevant interests than the Commission's "debt or equity plus" proposal. We support the Commission's proposal to attribute television LMAs.

Respectfully submitted,

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[17] Notice, par. 42.